

STATE OF MICHIGAN
COURT OF APPEALS

JAMES NATHANIEL THOMASON,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION and
MT. CLEMENS DODGE, INC.,

Defendants-Appellees.

UNPUBLISHED

March 30, 1999

No. 202817

St. Clair Circuit Court

LC No. 95-002326 NI

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). The lower court granted summary disposition after it denied plaintiff's untimely motion to extend discovery and permit him to amend his witness list to include two new expert witnesses. We affirm.

Plaintiff first challenges the lower court's decision to deny his motion to extend discovery and amend his witness list, which he brought after discovery and mediation were complete but before the court had scheduled a trial date. The trial court may order that any witness not listed in accordance with the rules be prohibited from testifying except for good cause shown. MCR 2.401(I)(2). This Court reviews a trial court's decision to grant or deny a motion to amend a witness list for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). As the trial court noted, alternative dispute resolution becomes meaningless when parties fail to obey the case scheduling order and complete discovery prior to mediation. The lower court also properly considered the effect of delay in this case, which had been pending for more than a year. We find no abuse of discretion here.

Plaintiff also argues that the trial court erred by granting summary disposition to defendants pursuant to MCR 2.116(C)(10), because they had the burden of disproving their liability under the doctrine of alternative liability. We review a lower court's decision to grant or deny a motion for summary disposition de novo. *Professional Rehabilitation Ass'n v State Farm Mutual Automobile Ins Co (On Remand)*, 228 Mich App 167, 170; 577 NW2d 909 (1998). A motion for summary

disposition tests the factual underpinnings of a claim and a court considers all the information available in the record in the light most favorable to the nonmovant. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320-321; 575 NW2d 324 (1998); *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1997). However, the nonmovant must do more than merely allege that a genuine issue of material fact exists. *Etter v Michigan Bell*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

In order to establish that there was a factual dispute on the products liability claim, and thereby survive the motion for summary disposition, plaintiff had to provide the trial court with evidence from which it could conclude that the van was defectively manufactured or designed. *Prentis v Yale Mfg Co*, 421 Mich 670, 683-686; 365 NW2d 176 (1984). Further, plaintiff had to provide evidence from which the trial court could reasonably infer that defendants' actions in creating or worsening the product defect proximately caused plaintiff's accident and injuries. *Skinner v Square D, Co*, 445 Mich 153, 159-164; 516 NW2d 475 (1994). If a plaintiff's theories of causation are pure speculation or conjecture, or the probabilities are evenly balanced, he will not have carried his burden of proof. *ACIA v General Motors Corp*, 217 Mich App 594, 604-605; 552 NW2d 523 (1996). Although plaintiff could rely on circumstantial evidence of defect and causation to carry his burden of proof, the evidence had to be substantial. *Skinner, supra* at 164-165. In this case, plaintiff utterly failed to provide the lower court with any evidence of a tort by defendants.

Nor could plaintiff rely on the theory of alternative liability in this case. In *Abel v Eli Lilly & Co*, 418 Mich 311, 331-332; 343 NW2d 164 (1984), our Supreme Court said that to shift the burden of proof to two or more defendants in a tort case the plaintiff must prove three things: *all* defendants acted tortiously; at least one of the defendants harmed the plaintiff; and the plaintiff cannot be blamed for being incapable of identifying which defendant caused his injuries. Plaintiff in the instant case never produced any direct or circumstantial evidence that *either* defendant acted tortiously, the threshold question for this type of burden shifting. *Id.*; see also *Marderosian v Stroh Brewery, Co*, 123 Mich App 719, 724-727; 333 NW2d 341 (1983). As a result, the trial court never had to reach the causation issue that alternative liability addresses, and did not err by failing to shift the burden of proof to defendants during summary disposition or by granting that motion.

Finally, plaintiff contends that the trial court did not completely dispose of his claims with its order granting summary disposition. We disagree. The lower court clearly stated that it intended its order to dismiss plaintiff's case in its entirety. Moreover, our analysis above supports the trial court's conclusion that none of plaintiff's claims were capable of surviving the motion for summary disposition based on the evidence contained in the record.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder

